University of St. Thomas Law Journal

Volume 3
Issue 2 *Fall 2005*

Article 10

2005

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John Harrison

ARTICLE

# UNIFORMITY, DIVERSITY, AND THE PROCESS OF MAKING HUMAN RIGHTS NORMS

JOHN HARRISON*

Maybe all the children cannot be above average, but every country can be exceptional in the sense that it can follow its own course on an issue, and thus be excepted from a possibly uniform rule on that issue. When variation is the best answer to a problem, exceptions are better than rules. With respect to whether the United States should follow international human rights law when that differs from what otherwise would be American practice, the questions are whether variation is desirable and, more subtly, whether the best way to determine if variation is desirable is to permit nonuniformity without requiring it and see whether it emerges.

The question I will address is whether the United States should adopt a policy of adhering to international norms on human rights in preference to the norms on those issues generated by this country's domestic political process. I will analyze it as a question of federalism—that is, as a question about whether government decisions are better made by central authorities for larger units or by decentralized decision makers for smaller units.[1] Regarding the process through which international human rights norms are

* David Lurton Massee, Jr. Professor of Law and Horace W. Goldsmith Research Professor, University of Virginia School of Law. Thanks to the other participants on this panel for their comments.

1. The question I have put, whether the United States should adopt a policy of adhering to international human rights norms, includes two important assumptions. One is that this choice, under current political arrangements, is one for the decision makers of the United States, not international decision makers. The United States will decide whether to follow international norms instead of domestic norms; the General Assembly of the United Nations will not decide whether the United States will follow its domestic norms rather than international norms. Less obvious, but also important, is the assumption that this is a question that, because it will be decided one country at a time, can be decided differently from country to country. A decision by the United States not to adhere to international norms in general does not preclude a decision by Turkey to do so. Supranational governmental bodies like the European Union do not have to be, or aspire to be, universal, any more than a fully-fledged state with a federal structure needs to be universal. This second assumption is important because several of my arguments about the merits and demerits of supranational decision making as opposed to domestic decision making apply specifically to this

formulated as a government is, of course, an abstraction from the real world, but that process produces rules that may be legally binding and hence, in a central sense, it is a legislative process. It is thus a fair approximation to think of the choice as a choice among legislatures that operate at different levels.[2]

I will argue that for the United States, decentralization with respect to human rights law is better than centralization. This country should not adopt a general principle of adhering to international human rights norms when those norms differ from corresponding American law.

People, whether considered individually or in groups, are alike in some ways and different in others. All individuals are alike in needing to eat and drink, and all political units are alike in needing to make arrangements that will facilitate their members' satisfaction of those needs. Individuals differ in many ways, such as in their responses to many medications. Political units likewise differ, sometimes for reasons related to the idiosyncrasies of the individuals they comprise, sometimes for reasons related to their own features such as geography. The best public-health rules for a densely populated city in a hot climate may well be different from the best public-health rules for a cold and rural place. The possibility of variation provides the basic argument for decentralized decision making.[3] When a government legislates for more people and more territory, it must consider more possible variation in its laws, because there are more grounds for variation. A government that extends only over a limited zone of climate, for example, must consider fewer possible climate-related variations in its public-health laws than must a government that rules both temperate and tropical territories. When government decision makers must consider the possibility of variation, they must make two choices: whether the rule should vary, and in every place in which a separate rule is required, what the rule should be.

A federal system can reduce the amount of information that must be acquired and understood by government decision makers by allocating authority to lower levels that rule fewer people and extend over a smaller area. It can make the choice between diversity and uniformity indirectly, without anyone having to address the issue. If the lower-level decision makers are functioning reasonably well and the ideal solution is one of uniformity, they will all reach the same result and produce uniformity even though no one

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country, not necessarily to any other. As one who welcomes nonuniformity in general, I find this reassuring rather than troubling.

2. American federalism itself divides responsibility for the formation and enforcement of human rights norms between levels, and assigns some of the most basic and important issues of all to the states. I will generally neglect internal American federalism in this discussion, other than to draw on it heavily for an understanding of federalism in general.

3. A classic statement of this principle specifically with respect to the provision of public goods is Wallace E. Oates, *Fiscal Federalism* (rev. ed., Ashgate Publg. 1993). Oates explains the diversity of preferences leads naturally to decentralization as a means of satisfying the preferences of as many people as possible. *Id.* at 11.

made that choice as such. If the ideal result is diversity, the varying answers provided by the lower-level decision makers will vary.[4]

Of course, there are standard reasons in federalisms to assign the decision to the center and not the subordinate units. Those reasons fall into two broad categories. One involves interactions and interdependencies among the subordinate units.[5] It may be, for example, that they face collective-action issues involving coordination or externalities. The classic instance of a coordination problem has clear applicability here: it is much more important that all fifty American states have the same-handedness rule of the road than that they have their own well-tailored rule. As for externalities, they range from economies of scale in the production of collective goods such as defense to cross-border pollution. In many such instances, bargaining among the smaller units is likely to be less effective than the creation of a unitary decision maker.

The other broad category consists of situations in which there is some reason to believe that the decision-making processes at the center are better than those in the subordinate units, more capable of making rational choices by whatever standard normatively applies. For example, a proponent of democratic decision making might favor the center in a country in which the central legislature was apportioned by population while the subsidiary legislatures were severely malapportioned.[6] One of the foundational texts of American political science, *Federalist 10*, argues from pure scale. According to Madison, under the conditions of 1788, democratic assemblies elected from larger polities are likely to be more just than democratic assemblies elected from smaller polities. Larger districts will tend toward the election of better people, and a multiplicity of interests in the legislature will inhibit the formation of exploitive majority coalitions.[7] Whether that was ever true and whether it is true now anywhere are hard questions.

As a general matter, then, decentralized decision making has important advantages, but there are identifiable situations in which centralization is nevertheless useful. I turn now to the application of these principles to the law concerning basic human rights and the choice between national and supranational law making.

Although it may seem obvious that variation is not appropriate with respect to basic human rights—which are called basic in part because they

4. The costs of decision making also make it impossible in practice to have a perfect match between the scope of a problem and the level of government that deals with it, because there can be only so many levels of government. *Id.* at 48–49.

5. As Oates explains, the natural case for decentralization is undermined by interjurisdictional externalities. *Id.* at 46.

6. In one large democracy the opposite is the case, with current constitutional rules requiring equipopulous legislative districts in the subsidiary units, *Reynolds v. Sims*, 377 U.S. 533 (1964), while one house of the national legislature is grossly malapportioned, U.S. Const. art. I, § 3, cl. 1 (Senate composed of two Senators from each state).

7. *The Federalist No. 10* (James Madison) (Gary Willis ed., 1982).

are the minimum to which everyone is entitled—in fact it may be. The abstract point may best be approached through a concrete example. Consider one striking way in which American law departs from the International Covenant on Civil and Political Rights, a departure sufficiently clear and important to be covered by one of this country's reservations in its ratification of the treaty. Article 20 of the Covenant provides that any propaganda for war shall be prohibited by law.[8] I think it clear that a federal or state statute providing "propaganda for war is hereby prohibited" would be unconstitutional on its face under current doctrine.[9]

For an American it may seem obvious that Article 20 was drafted by people who do not value liberty or do not believe in the marketplace of ideas, or both. But then to a non-American it may seem obvious that propaganda for war has borne bitter fruit over millennia, and that only a country as relatively lucky as the United States can get away with permitting it. And maybe both are right, and more to the point maybe the best rule about permitting or prohibiting propaganda for war varies in space. In some places the threat from warmongering may be especially great because ruinous war is often on the horizon. Or the costs of forbidding that kind of speech may be low because it does not figure prominently in the thought and rhetoric of the people. But the benefits of permitting pro-war advocacy may also be great. A country in which people revere advocates of martial virtue such as Theodore Roosevelt, or the Spartan mothers who told their sons to come back with their shields or on them, may find much to cherish in speeches in favor of taking up arms.[10] That country or another may find the cost of warmongering low, perhaps because the likelihood of war or ruinous war is low.

It is thus certainly possible that variation is the best outcome on this important question concerning free expression. If we think of the international legal system as a federalism, with the individual states as the subordinate units and the mechanism for formulating international norms as the center, we can ask the standard questions posed by federalism theory with respect to international human rights norms. Do the standard justifica-

8. Off. U.N. High Commr. Human Rights, *International Covenant on Civil and Political Rights* art. 20(1), http://www.ohchr.org/english/law/ccpr.htm#art20 (accessed Apr. 15, 2006). The United States Senate, in its resolution giving consent to U.S. ratification of the Covenant, included a reservation providing that Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States. 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

9. *See e.g. U.S. v. Eichman*, 496 U.S. 310 (1990) (flag burning may not be banned as such).

10. Indeed, a foundational document of this country refers to the necessity of taking up arms, and is certainly propaganda for one particular war, that of the American Revolution. On July 6, 1775, the Continental Congress adopted a Declaration of the Causes and Necessity of Taking Up Arms. Contl. Cong., *Declaration of the Causes and Necessity of Taking up Arms*, in *Documents Illustrative of the Formation of the Union of the American States* 10–17 (Charles C. Tansill ed., Govt. Prtg. Off. 1927).

tions for central decision making argue in favor of an international answer with respect to human rights like free expression?

As a general matter they do not. One perhaps surprising feature of basic human rights is that the benefits of having them and the costs of violating them are overwhelmingly local and do not give rise to interdependence. To begin with, human rights rules rarely if ever exhibit the kind of network effects that give rise to coordination problems. People must speak the same language in order to communicate and everyone at a circular dinner table must use either the bread plate on the right or the bread plate on the left, but variations as to human rights do not interfere with one another. A country that puts a high premium on personal honor, and so protects reputation and privacy vigorously, does not need to coordinate with a country that values expression highly and so allows its citizens to deal freely with one another's fame and personal information.[11]

Moreover, pure coordination problems can be solved with nothing more than communication, because it is individually rational for all parties who need to coordinate to follow the same rule; all they need is information about the rule and about one another's information about the rule. If any issues involving human rights should fall into this category, the United States and all other countries will find it in their interest to adopt the same norm and there will be no conflict between otherwise-applicable American views and those in the relevant international norm. In those situations, if there are any, it thus will not be necessary for the United States to adopt a policy of departing from what it otherwise would do in order to comport with international rules.

Coordination is only one reason for different jurisdictions, or different individuals, to adopt the same rule, or, more generally, to follow a rule adopted by a process that applies to all the jurisdictions or individuals. Other interaction effects that can give rise to problems among uncoordinated jurisdictions or individuals involve negative externalities, especially those arising from adverse material spillovers such as transborder pollution. Although such problems can sometimes be solved by bargaining, sometimes bargaining is inadequate and the best solution involves the creation of a common authority that can actually dictate a rule, rather than just enforcing a rule adopted by the parties.

Once again it is difficult to see how human rights law would often present such a situation. The material effects of respect for or violation of basic rights are heavily localized, because the effects are overwhelmingly borne by the individuals directly concerned. The primary victim of torture is the victim of torture. Perhaps the most important exception involves refu-

11. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (public figures may recover for defamation only by proving actual malice), commits the United States to a weighting that favors public debate at the cost of the reputations of those who have entered the public fray.

gees, who move across borders in response to human rights violations and so impose material costs on countries other than those that violate their rights. Whatever the importance of that possibility in the abstract, it is largely irrelevant to the United States, an immensely powerful magnet for immigration and not a place from which many people flee.

In any event, there is a serious mismatch between international human rights norms and the problem of interjurisdictional spillovers. That problem arises primarily not from variation but from lack of enforcement, and in the spillover context central authority primarily contributes enforcement, not norm formulation. For example, a landmark case in the development of international institutions for dealing with material interjurisdictional spillovers in the form of pollution, the *Trail Smelter Case*,[12] was about enforcement much more than about substance. The Canadian-United States arbitral tribunal deciding that case confronted air pollution from a smelter in British Columbia that spread to the United States. In formulating the applicable norms of international law, the tribunal drew freely on the domestic antipollution and nuisance law of one of the parties, the United States, and in particular on Supreme Court opinions dealing with interstate pollution.[13]An international body was needed, not to decide what the legal rules should be, but to create a forum in which they could be applied to sovereign states.

International human rights law, however, consists of a body of norms, not an enforcement system. When the United States took a reservation to the Covenant on Civil and Political Rights, it was engaged in a dispute about the appropriate content of the law, and the question whether to follow the Covenant or the First Amendment is a question about what rule to have, not about how to enforce it. There is good reason to believe that international human rights treaties encounter grave enforcement problems where they are most needed.[14] The issue of adhering to agreements like the Covenant is quite distinct from the question whether the United States should be party to an effective system of international adjudication concerning human rights, a system that would not have to have its own distinctive law. Such an enforcement system could simply require that states adhere to the human rights principles they ostensibly embrace, following the lead of the *Trail Smelter* tribunal by using states' own norms to decide interstate disputes. Were such a system in place, some states might then admit that their official position is not to recognize human rights. Were that to happen, it might be

12. *Trail Smelter Arbitral Tribunal Decision*, in *Reports of International Arbitral Awards* vol. 3, 1911 (William S. Hein & Co., Inc. 1997) (reported Apr. 16, 1938).

13. *Id.* at 1964–65.

14. Oona Hathaway conducted a substantial statistical study of state practice in ratifying and complying with human rights treaties. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 Yale L.J. 1935 (2002). She discovered that "treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected" and hypothesized that for countries with bad human rights records treaty ratification was a way to look good without performing. *Id.* at 1940–41.

useful to formulate truly minimal norms at an international level. Such hypothetical possibilities, however, have little to do with a debate about whether the international lawmaking process is a good way for resolving contested questions about human rights such as the propriety of banning propaganda for war. No such system of international enforcement is on the horizon.

Besides producing material externalities, jurisdictions may find themselves in collective-action traps in which they pursue policies that are collectively irrational because they lead to a race to the bottom. Identifying such situations is often a matter of controversy because one observer's bottom is another's top; interjurisdictional competition with respect to much regulation provides classic examples, as friends of regulation think the competition destructive while critics of regulation think it leads to better legal systems.[15]

It is a tricky question whether there is a substantial amount of destructive competition with respect to basic human rights rules. To say that there is implies that to a significant extent governments that otherwise would adhere to desirable policies with respect to human rights fail to do so in order to attract capital (or conceivably immigration, though for obvious reasons that seems especially unlikely). Although it is possible to imagine regimes that are prepared to be ruthless with respect to their own people but that would prefer not to be (were not being ruthless less costly in terms of rents that could be extracted from foreign investment), it is also easy to believe that such regimes are rare or nonexistent. Governments that are prepared to subject their people to violations of basic rights have all sorts of temptations to do so that involve purely domestic exploitation.[16]

Once again, the relevance of this question to the policy of the United States is quite limited. Cartels matter among actual or potential competitors, and it is hard to imagine that this country is attracting foreign capital by cutting corners on basic rights, and in particular that its refusals to adhere to international human rights norms reflect an American decision to compete for capital by offering a business-friendly but rights-unfriendly environment. This country does not permit propaganda for war in order to attract investment by arms manufacturers, and the former policy of the United States with respect to the age at which people could be held accountable for crimes through the death penalty—an especially controversial manifestation

15. A leading treatment of this issue in the environmental regulation context is Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210 (1992).

16. My skepticism on this point does not imply that governments are never influenced by an interest in attracting foreign capital. They very likely are, and it is entirely possible that such competition, which may or may not be desirable, affects policy decisions, such as policy with respect to labor unions. Variation among more or less decent governments with respect to debatable policy choices is quite distinct from the reaction of governments that are prepared seriously to exploit their subjects in order to spur investment.

of American exceptionalism—was not driven by an interest in bringing in capital investment. Other countries may wish they did not have to compete with the United States for investment, but any competitive disadvantage they may suffer would not be cured by American accession to more international human rights norms.[17]

As I indicated at the outset, the other main argument for making a decision at the center or a higher level is that the process used at the center or higher level is somehow superior to that used at the more local level. In some countries, many people no doubt would assent to unfavorable comparisons of their own political processes, and one important justification for the international elaboration of basic rules may be that it provides people in those countries who are trying to change their own system with some generic principles that do not have potentially embarrassing associations with any other country in particular. Once again, though, American exceptionalism, albeit in a quite weak form, is relevant here. For Americans the question is not whether the process that produces international human rights norms is superior to the similar process inside some or most countries, but whether it is superior to the process in this one. And it is important to bear in mind that the question is whether one process is superior to another. The fact that one regards the content of international human rights norms as superior to corresponding American norms is evidence of procedural superiority, but no more than that.

Having mentioned the venerable *Federalist 10*, I should quickly put it aside. If Madison's argument was ever correct, it has no relevance in this context. He proposed two mechanisms that would make a federal Congress more just than a state legislature. One was having larger districts from which members would be elected, which would make it more likely that individuals of good character would be elected.[18] The other was the interference that would be produced by multiple factions, or as we would say, interest groups.[19]

The first mechanism rests on pure scale, not relative size, and is long since obsolete even within this country. When Madison wrote, the population of the United States was about 4,000,000.[20] Today the smallest constituency represented in Congress, the state of Wyoming, has about 500,000

17. It can be argued that the United States could contribute to needed cartelization through the symbolism of joining in uniform human rights principles, rather than pursuing its own course. It is quite difficult to assess the likely practical impact of such symbolic moves.

18. Madison argued that large rather than small electoral districts were more likely to "refine and enlarge the public views," producing legislatures whose output would be more consonant with the public views than would be the unmediated decisions of the people themselves. *The Federalist No. 10*, *supra* n. 7, at 46–47.

19. *Id.* at 47–48.

20. U.S. Dept. Commerce, Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970*, 8, http://www2.census.gov/prod2/statcomp/documents/CT1970p1-02.pdf (Sept. 1975) (estimating U.S. population in 1790 at 3,929,000).

people.[21] As a substantial fraction of 4,000,000, 500,000 easily would satisfy Madison's criterion for a large district.[22] Indeed, today California has about 35,484,000 people.[23] The California Senate has forty members, while the California Assembly has eighty.[24] The smallest statewide constituency in California thus has more than 400,000 people. By Madison's standards, the Golden State alone should abound in virtuous characters who could be selected for public service through a process of refinement. The United States has already achieved the benefits of scale in which Madison believed, many times over. There is no more need for extension of the sphere of government.[25]

Madison's second mechanism involves interference among interest groups. The more interests represented in a legislature, he believed, the harder it would be for a majority faction to form.[26] Once again, the United States itself already has achieved whatever is to be achieved through this mechanism. The interests represented in and through the federal government are mind boggling in their number and range, a number and range that vastly exceed those contained in the small, agricultural country of which Madison wrote. If large republics reap the benefits described in *Federalist 10*, this country is more than large enough.

Differences other than scale and scope can distinguish public decision-making processes. Someone who believes in democratic decision making will prefer a more democratic process, and if the more democratic process operates at a higher or more central level of government, that level will be preferred for that reason and to that extent.

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21. Wyoming's population in 2003 was approximately 501,000. U.S. Dept. Commerce, Bureau of the Census, *Statistical Abstract of the United States* 20, http://www.census.gov/prod/www/statistical-abstract-2001_2005.html; *select* 1-69 under 2004–2005 column (last updated Jan. 4, 2006). Wyoming was the least populous state. *Id.* at 21. Its two Senators thus represent the smallest constituency in the upper chamber of Congress. Rhode Island, the least populous of the states that have two Representatives in the House of Representatives, had approximately 1,076,000 people in 2003. *Id.* at 20. Each of Rhode Island's two congressional districts thus should be more populous than Wyoming, making Wyoming's single Representative the member of the House with the smallest constituency.

22. Moreover, the figure of 4,000,000 overstates the population of the United States in 1790 for these purposes, because the disenfranchisement of women and slaves made most of the adult population in effect unavailable for public service.

23. *Id.* at 20.

24. Cal. Const. art. IV, § 2.

25. Madison did not say anything about the shape of the relationship between constituency size and virtue in the legislature, but it is hard to imagine that, if such an effect exists and operates in the direction Madison supposed, it is linear. If it were, the Congress of today would have, very roughly speaking, at least seventy times the public virtue of the first Congress. This seems unlikely. Rather, if Madison was correct at all, the effect must level off quite quickly.

26. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of interests composing the majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

*The Federalist No. 10*, *supra* n. 7, at 48.

Whether the process by which international human rights law is formulated is superior to the process by which American domestic human rights law is formulated is, of course, a question that can be answered only on the basis of some quite controversial normative assumptions. Moreover, a convincing answer to that question would require a circumstantial knowledge of that process that is much more detailed than mine. I can, however, state the two main grounds that cause me to expect that no systematic improvement in the quality of norms would result from moving these decisions from the American domestic to the international level.

First, if one believes as I do that representative democracy is the best way of resolving controversial questions on issues as to which individual choice is not a possible resolution—perhaps best only in being the worst except for all the others, but still best—then the process of international human rights norm formulation is not an improvement over the internal politics of this country. Treaties are negotiated by governments, and multilateral treaties that aspire to worldwide scope are negotiated by many, many governments. And many, many governments are themselves highly undemocratic.[27] Their participation in the formulation of norms thus makes that process less, not more, democratic. And the other major source of international law, state practice, reflects the conduct of those same states, so many of which are not democracies.

Next, the most plausible response to the foregoing objection also does not persuade me. The response is that the international process is superior to that of the United States because it incorporates the insights of many different cultures and traditions, and that the democratic credentials of the states involved is irrelevant on this score. Once again, the sheer size of the United States all by itself is a crucial consideration. This is a large country with free and extensive political debate. As such, it can make political decisions on the basis of a wide variety of views. It is true that the United States is also a liberal democracy, so there is very likely a strong bias in its public debate in favor of liberalism and democracy. That in turn suggests that the main marginal contribution to thought about basic human rights that would come from extending the range of debate to include other countries would be of views that are illiberal and undemocratic.

I would be very slow to conclude, and I think most Americans would be very slow to conclude, that the weakness in this country's political pro-

27. Every year Freedom House conducts a survey of freedom in the world that classifies countries as free, partly free, and not free. Freedom House, *Freedom in the World 2005*, http://www.freedomhouse.org/template.cfm?page=15&year=2005 (2005). For 2005, 192 countries were rated of which just under half, 89, were rated as free. *Id.* at http://www.freedomhouse.org/template.cfm?page=130&year=2005. Unfree countries included the world's most populous, China, which had the same freedom rating as Belarus and Somalia. *Id.* at http://www.freedomhouse.org/template.cfm?page=25&year=2005; *select* Combined Average Ratings 2005. There were 119 electoral democracies, not all of which were rated as free countries. *Id.*; *select* Table of Electoral Democracies.

cess is that no one listens to those who deny that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness, and that governments are instituted to secure these rights, deriving their just powers from the consent of the governed. If accepting international human rights norms means diluting those principles, most of us will ask to be excepted.